SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 294

ROBBINS COAL COMPANY, INC.,
Petitioner,

vs.

FIREMEN'S INSURANCE COMPANY OF
NEWARK, NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit.

DOUGLASS P. WINGO,
1115 First National Building,
Birmingham 3, Alabama,
Counsel for Petitioner.

JOHN S. FOSTER and
GRAHAM, BIBB, WINGO & FOSTER,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on March 30, 1961.

OPINIONS BELOW.

The opinion of the United States Court of Appeals, Fifth Circuit (infra, Appendix A, p. 12), is reported at 288 F. 2d 349.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 30, 1961 (infra, Appendix B, p. 26). A petition for rehearing was denied on May 11, 1961 (infra, Appendix C, p. 27). The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. A., Section 1254 (1).

QUESTION PRESENTED.

The sole question presented by this Petition is whether the evidence was sufficient to take to the jury the question of whether the fall of the coal bins of Petitioner had been caused by a landslide within the coverage of casualty insurance policy issued to Petitioner by Respondent.

STATEMENT OF THE CASE.

This suit was originally filed by Petitioner against Respondent in the Circuit Court of Jefferson County, Alabama, on February 13, 1959, and was by Respondent on March 2, 1959, removed to the United States District Court for the Northern District of Alabama where verdict and judgment for Petitioner was rendered on September 17, 1959. Upon closing of the evidence, Respondent moved that the Court direct the jury to return a verdict for Respondent on the ground, among others, of insufficiency of evidence as proof of occurrence of a slide or landslide. Upon the return of the verdict and entry of the judgment

the motion was renewed to set aside the verdict and enter a judgment notwithstanding the verdict. This last motion was overruled and denied by the Court on June 28, 1960, whereupon Respondent on July 15, 1960, filed its appeal to the United States Court of Appeals for the Fifth Circuit.

Petitioner was owner of two coal bins built on a steel frame over a railroad track. These bins were supported by six steel I-beams, three on each side of the railroad track. Connected with the bins was a conveyor which was supported by three additional steel I-beams, one of which is referred to in the record as Column B (sometime referred to as Column Triple X). On February 23, 1958, the coal bins collapsed. Petitioner contended that the collapse was caused by Column B sliding down the bank thereby subjecting other connecting tie rods and columns to such severe strain and tension that the bins were pulled down and collapsed. Petitioner further contends that the sliding of Column B was the result of a "slide or landslide".

Evidence in support of Petitioner's contention that there was a slide or landslide is circumstantial and based on testimony of several witnesses. J. F. Haughton, Jr. testified (R. pp. 30-35) that immediately after the collapse of the bins he observed that the earth had "slid down" under Column B (Triple X) so that the base of such column was estimated by him to be from two to four feet lower down the bank than its normal position.

Andrew H. Payne, Jr., Consulting Engineer, testified that in his opinion the first part of the structure to go down was Column B (R. p. 170). In his engineering course in college and also in his work as a practicing engineer, Payne had made a study of determining what causes the collapse of a structure (R. p. 168). Entirely independent of any litigation, either pending or contem-

plated, Payne had made a study to determine the cause of the collapse of the bin; and his conclusion based upon an examination of the various parts of the collapsed bin, upon photographs and upon inspection of the scene, was that the first part of the bin which collapsed was Column B (R. pp. 170, 197 and 198). Especially significant as confirming this conclusion were the nature of the break of a tie rod, the appearance of the base (channels and plates) of Column B, the appearance of the bins after the collapse and the direction of the fall of the bins (R. pp. 189-198). There is no dispute that the base of Column B was lower on the bank after the collapse than before. The dispute is as to whether or not the drop of this column took place before the collapse rather than as a result of the collapse.

Ralph E. Kirk, Mining Engineer, testified that the soil and conditions at the site of the tipple were conducive to a slide as was the condition of the weather (R. pp. 109-114).

Lonnie Norris, United States Weather Observer, testified as to temperatures, rainfall and snow fall for each day for period of ten days to and including the date of the collapse. His testimony showed alternate freezing and thawing and on one such day a combination of three inches of snow and one and a quarter inches of rain (R. pp. 84-87), which conditions the testimony of Mr. Kirk (R. pp. 113, 114, 120 and 121) showed were conducive to a slide.

Arthur J. Blair, a Geologist, testified that the soil at the site of the tipple was of a character which was susceptible to sliding and particularly if saturated or if subjected to freezing or thawing; and that the weather conditions and slope of the embankment at the site of the bins at time of collapse were conducive to a slide (R. pp.

92-99). He further testified that upon his visit to the site of the coal bins after their collapse he found there had been a slide beginning at about the edge of where the storage bin was located and extending to northeast a distance of one hundred or one hundred twenty-five feet (R. p. 100).

REASONS FOR GRANTING THE WRIT.

The decision rendered by the Court of Appeals for the Fifth Circuit is in conflict with numerous decisions of Courts of Appeal of other circuits as well as decisions of this Court.

By its reversal of the judgment entered by the trial judge in this case, the Court of Appeals has departed from and ignored principles established by successive decisions of this Court guarding the right of trial by jury. Efforts to wrest from the jury its prerogatives as trier of facts have been consistently resisted by this Court.

The unsoundness of reasoning of the Court of Appeals in this case is crystallized in its final conclusion (infra, Appendix A, p. 25) "that if the jury accepted as true, as we must assume it did, all of the testimony sworn to touching on observable facts, all this would show would be that the occurrence **could** have been caused by a slide. We do not think that all such proof warrants that it did so occur, since from the same proof the occurrence can, with equal probability, be attributed to other causes." This conclusion was reached notwithstanding the Court had further concluded "that the jury could believe that the foundation earth could have shifted" (infra, Appendix A, p. 17). The conflict of the Court of Appeals' reasoning with numerous other decisions is demonstrated by its following statement: "We think that it would be pure

speculation: first to decide that the drop of this column took place before the collapse rather than as a result of it, and, if so, that the drop was caused by a landslide or slide rather than by any other cause that might have undermined the base or foundation, since no testimony was adduced to show that any movement of earth was observed" (infra, Appendix A, p. 24). The Court of Appeals holds that the jury could, from the evidence, find that the foundation earth under Column B could have shifted; that the base of Column B was from two to four feet lower after the collapse than before; and that the ground surrounding the base of Column B was a type of soil that was susceptible to sliding under certain conditions of moisture. Then, ignoring the professional opinion of Andrew H. Payne that Column B dropped first and further ignoring the testimony of Lonnie Norris and other witnesses that those conditions as to "moisture" and other factors which rendered the soil susceptible to a slide actually existed at the time, the Court of Appeals substituted for the jury's verdict its own conclusion of what the jury's verdict should have been.

That the undisputed evidence in this case compels the conclusion that a question for determination by the jury was presented is shown by two portions of the opinion which demonstrate that the Court of Appeals in one instance ignored and in another instance apparently misconstrued, unintentionally, we are sure, the undisputed evidence. Such portions of the opinion are:

> "Support for the hypothesis that Column B had dropped from two to four feet was supplied by the testimony of plaintiff's vice president Haughton who testified that upon examining Column B after the collapse it was 'down lower on the bank,' and that 'it was about, I would say, two or three or four feet lower than what it normally was' " (infra, Appendix A, p. 17).

and

> "We cannot undertake to weigh the likelihood of correctness of these conflicting engineering theories. We only note that the plaintiff's witness testified that it could have happened the way he depicted it, and, in his opinion, it would have happened that way if Column B dropped first; whereas, witnesses for the defendant testified that in their opinion it could not have happened that way even if Column B had dropped first. The decision as to which theory was correct would normally be for the jury to make, if the proof showed that Column B dropped first, or if there was conflicting factual testimony from which the jury could find that this is what happened" (infra, Appendix A, pp. 23-24).

The first portion, in reciting the evidential support for the hypothesis that Column B dropped first, refers only to the testimony of the Plaintiff's witness Haughton and ignores Payne's expert testimony which was direct and positive to the point that Column B did in fact drop first. The second portion of the opinion quoted above which analyzes the "conflicting engineering theories" apparently misconstrues the testimony given by Payne on the material point of whether Column B dropped first. For the portion of the opinion here mentioned recites that the Plaintiff's witness (Payne) testified that the collapse **could** have happened the way he depicted it, and that, in his opinion, it would have happened that way if Column B dropped first. The fault in that portion of the opinion here considered is that the expert witness Payne did not merely testify that the collapse **could** have happened by Column B dropping first (as the opinion of the Court of Appeals says); but he testified that in his opinion Column B **did** drop first (R. pp. 170, 197 and 198).

Well established principles, frequently applied by this Honorable Court and by the various Federal Courts of Ap-

peals, demonstrate that Payne's direct and positive testimony to the effect that Column B dropped first required submission of the issue to the jury. Decisions to be presently cited demonstrate that submission of such issue to the jury is essential to the preservation of the right of trial by jury. In considering whether Payne's testimony was sufficient to raise a jury question, it should be borne in mind that the evidence established incontestably that Payne was qualified both by education and by professional experience as an expert in determining what causes the collapse of a structure (R. p. 168), and that his conclusion, based upon an examination of the various parts of the collapsed bin, upon photographs and upon inspection of the scene, was that the first part of the bin which collapsed was Column B (R. pp. 170, 197 and 198). Payne supported his conclusion by very cogent reasons, which included the nature of the break of a tie rod, the appearance of the base (channels and base of Column B), the appearance of the parts after the collapse and the direction of the fall of the bins (R. pp. 189-198). Decisions hereafter cited compel the conclusion that Payne's expert testimony, direct to the point that Column B **did** drop first, required submission of the issue of liability to the jury. The first opinion upon which we rely in support of this conclusion is the opinion of the Court of Appeals in the instant case. The Court of Appeals said:

> "The decision as to which theory was correct would normally be for the jury to make, if the proof showed that Column B dropped first, or if there was conflicting factual testimony from which the jury could find that this is what happened" (infra, Appendix A, p. 15).

Thus the Court of Appeals expressly recognized that "if there was conflicting factual testimony from which the jury could find" that Column B dropped first, then the question of liability was for the jury. We reiterate that Payne's direct and positive testimony, based upon the very cogent

reasons stated by him, constituted "factual testimony from which the jury could find" that Column B **did** drop first.

The Court of Appeals for the Fifth Circuit has itself heretofore stated: "It is the paradox of the jury system that, for one case, for that time and for that occasion, all conflict, no matter how technical or profound, ceases and resolution comes by the verdict." Saunders v. Pool Shipping Co., 235 F. 2d 729. This principle had been earlier supported by the same court in Marsh v. Illinois Central Railroad, 175 F. 2d 498.

The fallacy of the reasoning of the Court of Appeals for the Fifth Circuit in the instant case with respect to "speculation," "testimony sworn to on observable facts," and "other cause that might have undermined the base or foundation" is apparent from the conflict of such reasoning with established principles stated in numerous decisions.

As recently as November 7, 1960, this Court has reiterated such principles as follows: "True there was no direct evidence of play in the jaw of the wrench, * * * But direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. * * * 'It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes.' " Thomas Michalic v. Cleveland Tankers, ... U. S. ..., 5 L. Ed. 2d 20, 81 S. Ct. ...

The Circuit Court of Appeals for the Eighth Circuit has stated the principle clearly as follows: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the

dispute by choosing what seems to them to be the most reasonable inference." C. & N. W. Railroad v. Grauel, 160 F. 2d 820.

The Court of Appeals could not ignore the opinion of the witness Payne that Column B dropped first nor the testimony of witnesses Kirk, Norris and Blair to the existence of facts and circumstances from which a slide could be reasonably inferred. "To justify ignoring of evidence under rule that it is contrary to established physical facts, the evidence ignored must be utterly at variance with well established and universally recognized physical laws and therefore inherently impossible." Travelers Indemnity Co. v. Parkersburg Iron & Steel Co., 70 F. 2d 63. "It is only where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to leave no doubt what the fact is, that the Court should direct a verdict." Svenson v. Mutual Life Insurance Co. of New York, 87 F. 2d 441.

The writ should be granted because the decision of the Court of Appeals is in conflict with the principles stated in cases above cited reiterating what has been held in numerous decisions of Courts of Appeal and of this Court among which are the following: Myers v. Pittsburg Coal Co., 233 U. S. 184, 58 L. Ed. 906, 34 S. Ct. 559; Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248; Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740; Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, 88 L. Ed. 520, 65 S. Ct. 409; Davis v. Virginia Railway Co., 361 U. S. 354, 4 L. Ed. 2d 356, 80 S. Ct. 387; Mutual Life Insurance Co. of New York v. Hatten, 17 F. 2d 889; Columbian National Life Insurance Co. v. Comfort, 84 F. 2d 291; Elzig v. Gudwagen, 91 F. 2d 434; Channel v. Simpson, 108 F. 2d 315; New York, N. H. & H. R. R. Co. v. Dox, 249 F. 2d 572.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Douglass P. Wingo

DOUGLASS P. WINGO,
1115 First National Building,
Birmingham 3, Alabama,
Counsel for Petitioner.

JOHN S. FOSTER and
GRAHAM, BIBB, WINGO & FOSTER,
1115 First National Building,
Birmingham 3, Alabama,
Of Counsel.

I hereby certify that a copy of the foregoing petition for writ of certiorari has been served upon counsel for Respondent by mailing copies thereof, United States postage prepaid to Joseph S. Mead and Emmett R. Cox, Esq., 1033 Frank Nelson Building, Birmingham 3, Alabama.

This the 7th day of August, 1961.

Douglass P. Wingo

Counsel for Petitioner.

APPENDIX A.

In the United States Court of Appeals for the Fifth Circuit.

No. 18,532.

Firemen's Insurance Company of Newark, New Jersey,
Appellant,
versus
Robbins Coal Company, Inc.,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(March 30, 1961.)

Before Tuttle, Chief Judge, and Cameron and Wisdom, Circuit Judges.

Tuttle, Chief Judge: At the threshold of this case we are met by a motion by the appellant to permit it to amend its petition for removal from the state court in order adequately to allege grounds of diversity jurisdiction. The difficulty arose because of the 1958 amendment to the removal statute, 28 U. S. C. A., Sec. 1332 (c), which now defines corporate citizenship to include any state in which a corporate party has its principal place of business. The petition for removal alleged diversity in the following terms:

> "Petitioner further shows that the plaintiff, Robbins Coal Company, Inc., a corporation, at the time of the beginning of said action and ever since has been and still is a citizen of the State of Alabama; that the petitioner, the defendant in this cause, at the beginning of said action and ever since has been and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and is a citizen of said State; that the controversy in said cause of action is entirely between citizens of different states; . . ."

Recognizing that the specific allegation of citizenship may be inadequate to aver diversity jurisdiction, see **Kinney v. Columbia Savings & Loan Association,** 191 U. S. 78, and that a jurisdictional defect must be noticed by this Court sua sponte, even though not raised by the adverse party, the appellant, the removing party below, moved here to cure this omission in its petition for removal. It seeks to add the allegation that the plaintiff's principal place of business was in Alabama and that the defendant's principal place of business was in New Jersey. This would cure the defect.

The appellee does not dispute, but, in fact, concedes, the truth of the allegations, and agrees that it also believes that it is permissible for the appellant to file such an amendment.

We agree. This Court has held that a defective allegation of diversity jurisdiction in a suit originally filed in a federal district court can be amended in the Court of Appeals. **Kaufmann v. Western Union Telegraph Co.,** 5 Cir., 224 F. 2d 723. We think this is authorized by the provisions of 28 U. S. C. A., Sec. 1653:

> "Defective allegations of jurisdiction may be amended upon terms in the trial or appellate courts."

Moreover, we think this same right should obtain with respect to a petition for removal. See **Park v. Hopkins**, S. D. Ind., 179 F. Supp. 671. The general allegation in the original petition for removal in this case, "that the controversy in said case is entirely between citizens of different states," although conclusionary in nature and possibly not sufficient if not amended, is sufficient to confer jurisdiction on the federal courts to permit the curing of the defect by amendment. See **Kinney v. Columbia Savings & Loan Association**, supra.

We conclude, therefore, that by the allegations relating to citizenship asserted in appellant's motion, and conceded by appellee's response, the original motion for removal is hereby deemed to have been amended to incorporate the additional allegations of citizenship. As thus amended, the removal was proper.

The principal question on the merits of the appeal is whether the plaintiff made out a sufficient case to warrant a submission by the trial court to the jury the plaintiff's contention that an expensive coal-loading structure collapsed as a result of a "landslide, slide," which was the peril insured against in the defendant's policy.

Although it is difficult to outline the contentions of the parties without photographs or drawings, we believe the factual situation necessary for a disposition of the legal issues can be recited in a simplified form.

The collapsed structure was in the nature of two large coal bins which were joined by a conveyor to a tipple. We are not concerned with the conveyor or the tipple. The coal bins were built on a steel frame over a north-south spur railroad track. The steel frame was supported by six steel I-beams. Extending out from the east, or road, side of the frame were two conveyor belts by means of which coal could be delivered from the bins to trucks standing on a road that paralleled the railroad track. This road was

built at a level some ten feet higher than the railroad level, and was separated from the railroad tracks by a steep bank and a walkway alongside the tracks. The conveyor belts were supported by an additional steel structure consisting of steel beams resting on three steel I-beams. It was undisputed that these upright I-beams did not bear any of the load of the coal bins. They formed a line of three beams parallel to the steel I-beams that supported the bins. Two of the columns supporting the conveyor belts were bolted onto concrete blocks imbedded at the top of the bank. A third one (designated in exhibits and hereafter called column B, and which is the column as to which all of the litigation relates), was bolted onto the center of three steel channels which were in turn bolted onto a two-foot by three-and-a-half-foot steel plate. This entire footing was based "on solid ground" at the bottom of an excavation in the bank of some four feet depth. The record does not indicate whether this excavation was left open or was later filled in. However, it is undisputed that it was protected by a stone retaining wall on the upper side, and that this wall was still in place after the collapse.

On February 23, 1958, the coal bins collapsed and fell towards the road. Photographs taken after this casualty show both the I-beams supporting the bins and the I-beam supporting the conveyor structure badly twisted and bent in the direction of fall. Stated as simply as possible, the plaintiff contended that a movement of the earth amounting to what is contemplated in the insurance policy under the definition of "landslide, slide", caused this beam to drop or slide from two to four feet; that this caused a pull through a tie rod on the center of the three easterly beams supporting the coal bins, and that this brought about the fall of the entire structure.

The defendant contends that the plaintiff failed in its proof to show that a movement of earth of any kind took

place. It contends that the collapse took place by reason of the failure of the beams supporting the coal bins; that this caused the bins to fall over on beam B and thus caused it to bend and twist in the form in which it was found after the occurrence.

Clearly we should not undertake to resolve such a question of fact if there is substantial evidence to support the respective theories advanced by the parties. The burden of proof that a "slide" occurred and caused the damage is on the plaintiff. Evidence, in order to warrant submission to a jury, must present something more than a theory which will permit speculation, see **Galloway v. United States**, 319 U. S. 372, 395, and it must be something more than a mere scintilla. **Martin v. Burgess**, 5 Cir., 82 F. 2d 321; **N. Y. Life Insurance Company v. Sparkman**, 5 Cir., 101 F. 2d 484; **Reuter v. Eastern Air Lines**, 5 Cir., 226 F. 2d 445; **Nashville Bridge Co. v. Ritch**, 5 Cir., 276 F. 2d 171.

In view of the fact that no witness testified to the actual fact of any movement of the earth, and that a finding by the jury of such movement must necessarily have resulted by a process of inferring that fact from surrounding circumstances, it becomes necessary that we carefully review the evidence in support of the plaintiff's theory. Of course, in doing so we must view the evidence supporting the plaintiff's position most strongly in its favor. See **Shaw v. Hines Lumber Co.**, 7 Cir., 249 F. 2d 434; **Burcham v. Stevens & Co., Inc.**, 4 Cir., 209 F. 2d 35. Except as just stated, we do not, of course, have the power to weigh the evidence.

Support for the plaintiff's theory was in the nature of expert testimony given by a qualified engineer who theorized that if column B dropped between two and four feet this would have exerted some 60,000 pounds of pull on a tie rod connecting column B to the center sup-

port column for the bins and would so throw the structure out of balance as to bring down the coal bins in the manner in which they fell. Support for the hypothesis that column B had dropped from two to four feet was supplied by the testimony of plaintiff's vice president Haughton, who testified that upon examining column B after the collapse it was "down lower on the bank," and that "it was about, I would say, two or three or four feet lower than what it normally was." In response to a question, "Do you know of your own knowledge as to whether or not when these bins fell on Column [B] and bent it, whether or not that caused it to move or not?" Haughton answered, "I couldn't answer that." Haughton also testified that there was a part of the bank in place before the collapse but that after the collapse and after the debris had been removed, the bank was not there.

In dealing with the facts, we conclude that the jury could have found that if column B moved first then this brought about the collapse. The jury could also believe that the footing of the column was from two to four feet lower after the collapse than it had been before. The jury could also believe that the ground surrounding the footing was a type of soil that was susceptible to sliding under certain conditions of moisture; thus, even though the steel plate and channel beams were 24 x 42 inches in surface contact on what the plaintiff's vice president Haughton said was "solid earth", there was testimony from which the jury could believe that the foundation earth could have shifted. There was also meteorological testimony to the effect that the rains were heavy preceding the occurrence and that there had been a high incidence of alternating freezing and thawing temperatures.

Testimony touching on the conditions against which these circumstances must be evaluated are: the bins were substantially filled with coal and the weight on the beams supporting them was considerably greater than that rec-

ommended as safe under some recognized engineering standards; the two middle bin-supporting columns were supporting some 62 tons each, or 124,000 pounds; some vibration in the structure resulted from the sifting of the coal when loading operations were under way; column B supported weight of less than 3,000 pounds. On the poorest foundation it would support some 14 tons or 28,000 pounds; it was resting on solid earth; the total weight of the bins when they fell over onto column B or onto the beam connecting it to the next column was sufficient to bend that column into the shape of the letter C; the only eyewitness who testified to seeing **any** column move or bend was a coal truck driver named Woods, who saw one of the support columns for the bins (the southeast column hereafter called F) "quiver" and "sink down". There were railroad cars on the track being filled. Another witness had testified that he had heard two cars bump. Woods then takes up the following story:

> "Well, I was watching the boys on the truck, and the first thing I discovered, I heard just a kind of pop or a crack, and I noticed that this post right on this front corner this way, I noticed it quivered, and kind of sank down a little, and then started leaning over (indicating and illustrating).
>
> Q. I will ask you to state whether or not you are referring to the post that was on the bank.
>
> A. Yes, sir, just this here post right here—put your pointer up there and I will show you.'
>
> Q. I would rather for you to point it out.
>
> A. It was this here one right here (indicating).
>
> Q. It was not the one on the bank?
>
> A. Well, I looked at this one, and this one was quivering, and I saw it start coming over and I began to get out of the way.
>
> Q. My question was what post that you first saw, what part of it you first saw going down.

A. This one right here (indicating).

Mr. Foster: I can only plead surprise. He doesn't understand the diagram because that's not what I understood him to say before.

The Court: Are you referring to the post on the bank (column XXX) or the post under the bank (southeast main column) that you first saw moving?

The Witness: The main column right here, sir (indicating).

The Court: The one under the bank?

Mr. Mead: No, the one on the railroad track.

Q. The one on the railroad track?

A. Yes, sir.

Mr. Foster: I am pleading surprise, that's all I can say. I have talked to him twice before."

. . . .

Q. I will ask you, Mr. Woods, whether or not it was asked you (referring to a statement made by the witness before the filing of suit) whether or not your attention was attracted to this column right here, or the one under the conveyor bucket? (Column XXX (B)).

A. The first one I noticed, sir, was this one right here (indicating the southeast main column). I just happened to notice that way, this one right here.

Q. You were standing where you could see this column here under the conveyer belt, were you not? (Column XXX (B)).

A. Yes, sir, I could see it, but I didn't notice that one (indicating column XXX (B)).

Q. You didn't notice that one?

A. I didn't notice it to begin with. I began to get out of the way from there.

Q. How long had this column here that you marked column A in Exhibit A to your statement (southeast main column), how long had that been moving before

you noticed the column under the conveyor belt move?

A. Well, I would say half a minute, or hardly that long.

Q. In other words, this column over here, Exhibit A to the photograph to your statement (southeast main column under dust bin), you think began to vibrate before the column under the conveyor belt (column XXX) began to move or vibrate?

A. I wouldn't say it did before, because I wasn't noticing that column, I was noticing the other one. I was looking towards the top of the bin.

Q. Looking towards the top of the bin?

A. Right.

Q. Let's put it this way. Did you ever notice this column under the conveyer belt move?

A. No, sir, to tell you the truth, I didn't, because I was getting out of the way.

Q. Did the bins fall on that column (column XXX) there under the conveyer belt?

A. Yes, sir.

Q. Did it bend it?

A. Well, I wouldn't say about that. It come down on it.

Q. I will ask you whether or not, if you recall, you noticed any of the bracing or tie rods break?

A. No, sir, I didn't notice them breaking until after it began to fall over. There was a lot of popping and cracking. I didn't know what it was."

The parties are in agreement that the column or post that Woods said he saw move was one of the main support columns at the side of the track and not the column B that plaintiff claimed caused the damage. The physical circumstances existing at the moment Woods saw the column "quiver" and "sink down" are that he was watching some men straight ahead of him (to the north); column B was a little to the left (west) of this

direction and but a few feet from him; the column F was more to his left (farther west) and at a greater distance. If plaintiff's theory of the occurrence is correct, then Woods glanced past column B which had dropped or was in the process of dropping from two to four feet without noticing it, and looked further on to his left and saw only the southeast column quiver and "start coming over."

We make this comment not to weigh the evidence, but to look at these undisputed observed facts against which we must view the circumstances claimed by the plaintiff to be sufficient to permit a favorable inference by the jury.

Recognizing the danger that our approach to the real issue before us may be improperly colored by the strong impression we get from reading the record and carefully examining the photographs that the collapse did not result from a moving by column B, we have carefully tried to give only such play to this impression as it deserves. That is, that we must determine whether, from the circumstances which the jury could find existed, the jury could legally infer that a slide **caused** column B to drop or whether the jury could only determine that it **might** have done so, and thus speculate rather than infer.

It does not help too much to repeat legal formulas with which all agree, but it is necessary for us to keep constantly before us the admonition that a jury verdict must be based on proven facts, including legally permissible inferences from proven circumstances, and not on pure speculation or conjecture.

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." **Galloway v. United States**, 319 U. S. 372, 395.

We have applied the principle stated here in numerous cases in which we have found that the alleged chain of circumstances claimed to be sufficient to permit a jury's consideration is too tenuous to permit of anything more than pure speculation.

In **Smith v. General Motors Corp.**, 5 Cir., 227 F. 2d 210, 216, we said:

> "The criticism in the field of logic, even though such criticism does not result in an absolute prohibition against piling inference on inference, stems from the very remoteness of the conclusion from the known facts."

In Alabama, the state whose substantive laws we here apply, the State Supreme Court has dealt with this kind of situation, using the following language:

> "The proof in this case, in our opinion, goes no further than to show that the force with which the truck hit the curb wall **could** have been caused by defendant's truck driver driving at an excessive rate of speed. But we do not think that the proof warrants the conclusion that it **did** so occur, since from the same proof the force of the impact can with equal probability be attributed to mechanical failure of the truck. As we view the evidence it is without **selective application** to either of the theories of causation, and, therefore, they remain conjectures only. **Griffin Lumber Co. v. Harper**, 25 So. 2d 505, 509. (Emphasis added.)

See also, for cases from other states in which this Court has applied this principle, **McNamara v. American Motors Corp.**, 5 Cir., 247 F. 2d 445; **J. C. Penney Co. v. Norris**, 5 Cir., 250 F. 2d 385; **Theriot v. Mercer**, 5 Cir., 262 F. 2d 754; **Clarkson v. Hertz Corp.**, 5 Cir., 266 F. 2d 948. In the last case we stated:

> "In the case before us, it is quite apparent that there is no affirmative proof before the Court which, if believed in toto, as it must be for the purpose of summary judgment, would support a finding of negligence on the part of the defendant."

So, too, in the case before us, it must be assumed, as we have already stated, that the area where this beam was based was of a kind that easily shifted if on a slope; that the weather conditions were conducive to such a shifting or slide; that following the collapse of the bins the column was from two to four feet lower than it had previously been, although it was not known whether it had dropped before or after the collapse upon it; and that if it dropped first, it would have pulled over the bins.

There was expert professional engineering testimony that challenged the theory that the sinking of column B would have the effect of exerting 60,000 pounds or any other amount of pull on the tie rod. Two defense expert witnesses who took this position claim that if the base of column B slipped downward and towards the railroad track (and thus towards the base of columns supporting the bins) this would not exert any pull on the tie rod, but would simply keep it in the same degree of tension as when in its original position. They theorized that the bins collapsed because of structural weakness of the columns supporting the bins themselves.

We cannot undertake to weigh the likelihood of correctness of these conflicting engineering theories. We only note that the plaintiff's witness testified that it **could** have happened the way he depicted it, and, in his opinion, it **would** have happened that way if column B dropped first; whereas, witnesses for the defendant testified that in their opinion it **could not** have happened that way even if Column B had dropped first. The decision as to which theory was correct would normally be

for the jury to make, if the proof showed that column B dropped first, or if there was conflicting factual testimony from which the jury could find that this is what happened. In the absence of such testimony the plaintiff makes two arguments to support his contention that there was a jury issue. One of these is, arguing backward from what happened, (a) the bins collapsed; (b) their collapse would have been caused **if** column B moved downwards; (c) therefore, the jury could infer that column B did in fact move first. The other is that (a) column B was set in a bank in an area in a kind of soil that (b) under weather conditions then prevailing was susceptible to slide; (c) that after the bins had fallen (admittedly striking the column B or its adjacent member with sufficient weight nearly to bend it double) the base of column B was two, three or four feet lower than it had been normally; (d) therefore, column B was caused to drop by a landslide or a slide, (e) **before** the collapse.

Accepting it for the purpose of this discussion the plaintiff's theory that **any** movement downward of a mass of earth, no matter how small, was a slide within the terms of the policy, we think that it would be pure speculation: first, to decide that the drop of this column took place before the collapse rather than as a result of it, and, if so, that the drop was caused by a landslide or slide rather than by any other cause that might have undermined the base or foundation, since no testimony was adduced to show that any movement of earth was observed.

We are forced to the conclusion that if the jury accepted as true, as we must assume it did, all of the testimony sworn to touching on observable facts, all this would show would be that the occurrence **could** have been caused by a slide. We do not think that all of such proof warrants the conclusion that it **did** so occur, since from the same proof the occurrence can, with equal prob-

ability, be attributed to other causes. As stated in the Alabama case, **Griffin Lumber Co. v. Harper, supra,** "the evidence is without selective application to either of the theories of causation, and, therefore, they remain conjectures only."

It follows, therefore, that at the conclusion of the presentation of evidence, the defendant was entitled to a directed verdict.

The judgment is Reversed and the case Remanded to the trial court for an entry of a judgment for the defendant.

Test:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals,
Fifth Circuit,
New Orleans, Louisiana.

July 31, 1961.

APPENDIX B.

Judgment.

Extract From the Minutes of March 30, 1961.

Firemen's Insurance Company of Newark, New Jersey,

No. 18532. versus

Robbins Coal Company, Inc.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for an entry of a judgment for the defendant;

It is further ordered and adjudged that the appellee, Robbins Coal Company, Inc., be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[241] **APPENDIX C.**

In the United States Court of Appeals for the Fifth Circuit.

No. 18,532.

Firemen's Insurance Company of Newark, New Jersey,
Appellant,

v.

Robbins Coal Company, Inc.,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(May 11, 1961.)

On Petition for Rehearing.

Before Tuttle, Chief Judge, Cameron and Wisdom, Circuit Judges.

Per Curiam:

It is Ordered that the petition for rehearing filed in the above-styled and numbered cause be, and the same is, hereby Denied.

Order Denying Rehearing, Filed May 11, 1961.

Office-Supreme Court, U.S.
FILED
SEP 8 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 294.

ROBBINS COAL COMPANY, INC.,
Petitioner,

vs.

FIREMEN'S INSURANCE COMPANY OF NEWARK,
NEW JERSEY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

GEORGE W. YANCEY,
1103 Comer Building,
Birmingham 3, Alabama,
Counsel for Respondent.

JOSEPH S. MEAD,
EMMETT R. COX and
MEAD, NORMAN & FITZPATRICK,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

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BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED.

Petitioner states that the sole question presented is whether the evidence was sufficient to take to the jury the question of whether the fall of the coal bins of petitioner had been caused by a landslide within the coverage of the casualty insurance policy issued to the petitioner by respondent.

Respondent agrees that this was the sole basis of the decision of the Court of Appeals, but points out that it is impossible to consider this question here, because the entire record in the Court of Appeals is not before this Court.

STATEMENT OF THE CASE.

It is impossible to state the facts in this case because the entire record is not before this Court. The most important evidence in the case consisted of numerous photographs made soon after the collapse of the coal storage bins. These photographs were introduced by both the petitioner and respondent and were unimpeached. The court below referred to these photographs in its opinion and at the outset recognized the difficulty of even outlining the contentions of the parties without photographs or drawings.[1] Further, the court below noticed that photographs had been taken after this casualty showing both the I-beams supporting the bins and the I-beam supporting the conveyor structure badly twisted and bent in the direction of the fall.[2] And then the court observes that its opinion is rested in substantial part upon a careful examination of these photographs.[3]

The record below showed that there were forty-four photographs in evidence, and other documentary evidence, all of which are absent,[4] and manifestly, without these photographs before this Court it is impossible to state the evidence upon which the decision of the court below was rested.

The failure to have these exhibits certified to this Court is in violation of the mandate of Rule 21 of this Court.

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[1] Petition, p. 14.

[2] Petition, p. 15.

[3] Petition, p. 21.

[4] R. 615-618.

SUMMARY OF ARGUMENT.

This case involves merely the sufficiency of the evidence to warrant submission to the jury of the question of whether the petitioner's coal bins collapsed as a result of a landslide.

The only reason suggested by petitioner for the granting of the writ is that the decision below is in conflict with decisions of courts of appeal of other circuits as well as decisions of this Court. A careful examination of the authorities cited by petitioner, however, together with a careful examination of the petition reveals that the petitioner's argument is not with the rules of law pronounced by the court below, but merely with the court's interpretation and analysis of the evidence.

This case does not involve construction of a Federal statute, or a constitutional question, or a conflict between courts of appeal, or a question of public interest. It is important to the parties and no other.

The opinion of the court below indicates a comprehensive study of the record in this case and a perceptive analysis of the issues.

This Court has on a number of occasions stated that certiorari is inappropriate where the petitioner seeks merely to review evidence and inferences therefrom: **Southern Power Company v. North Carolina Public Service Co.**, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413; **United States of America v. James J. Johnston**, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925; **General Talking Pictures Corporation v. Western Electric Company, Inc., et al.**, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849. And see **Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443;

Dick v. New York Life Ins. Co., 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921; **Michalic v. Cleveland Tankers, Inc.**, ... U. S. ..., 5 L. Ed. 2d 20, 81 S. Ct. ...; **Sentilles v. Inter-Caribbean Shipping Corp.**, 361 U. S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173; **Wilkerson v. McCarthy et al.**, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; **Annotation**, 4 L. Ed. 2d 1787, 1790, Footnotes 19 and 20.

ARGUMENT.

This Case Involves Merely a Review of the Evidence and Is, Therefore, Not an Appropriate One for Review by Certiorari.

Pretermitting the question of whether the entire record is before this Court, we shall consider the propriety of the Court's weighing the evidence in this case on the assumption that the record was before the Court.

At a time when the docket of this Court is burdened with cases of vital public and governmental interest, the Court has been asked to spend countless hours reviewing a record consisting of six hundred nineteen pages, numerous photographs, diagrams and other exhibits, and decide whether the Court of Appeals correctly concluded that there was insufficient evidence in this case to warrant submission to the jury of the question of whether the petitioner's coal bins collapsed as a result of a landslide. It is respectfully suggested that this is not an appropriate case for review in this Court by certiorari.

The only reason suggested by petitioner for the granting of a writ of certiorari is that the decision of the court below is in conflict with numerous decisions of courts of appeal of other circuits as well as decisions of this Court.[1]

A cursory examination of the petition might indicate that this is true, but a careful examination of the petition and the authorities cited therein makes it very clear that the petitioner seeks merely to review the evidence in this Court. The petitioner, appellee below, filed a petition for a rehearing and a brief and argument in support of the petition, and the first statement in the argument is:

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[1] Petition, p. 5.

"The appellee does not question the soundness of the principles of law stated in the opinion. The opinion (page 12) aptly refers to said principles as 'legal formulas with which all agree.' "

The cases cited in the petition which are alleged to be in conflict with the decision below are merely cases where the Court has reviewed the sufficiency of the evidence under the peculiar circumstances before the Court to warrant submission to the jury. They contain no rules of law contrary to those applied to this case by the court below.

There is nothing whatsoever that distinguishes the case at bar from the thousands of cases in which a judgment has been directed for the defendant because of insufficiency of the evidence. It does not involve construction of a Federal statute, or a constitutional question, or a conflict between courts of appeal, or a question of public interest. Granting certiorari would merely afford petitioner a "second appeal" and a second review of the evidence.

Counsel for respondent were impressed upon reading the opinion by the Court of Appeals in this case, as we think this Court will be, that the court demonstrated a familiarity with the entire record and an unusually perceptive grasp of the problems involved.

It would be presumptuous of counsel for respondent to attempt to outline the many reasons for denying certiorari where the petitioner seeks merely to review the evidence and inferences therefrom—the Court itself is intimately familiar with them and has considered them at length on many occasions. We shall, however, call to the Court's attention some of the cases in which the propriety of such a review has been considered.

Southern Power Company v. North Carolina Public Service Co., 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924),

was before the Court on writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review a judgment modifying the judgment of the District Court in a proceeding to compel the furnishing of electric current and power for certain public use. During the argument in this Court it developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use. Mr. Justice McReynolds, speaking for the Court, noted that this was primarily a question of fact, and that was not the ground upon which certiorari was granted, and had it been sufficiently developed would not have moved the Court to grant the writ. The writ was dismissed.

United States of America v. James J. Johnston, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925), was before the Court on writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment reversing a judgment of the District Court convicting defendant of violation of the provisions of the Internal Revenue Act requiring payment of tax on fees exacted for admission to a theatre. Mr. Justice Holmes, speaking for a unanimous Court, said:

> "We do not grant a certiorari to review evidence and discuss specific facts."[1]

General Talking Pictures Corporation v. Western Electric Company, Inc., et al., 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938), was before the Court on writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Three suits had been brought in the District Court by respondents to restrain patent infringements. The lower court had held that six of the patents were valid and had been infringed by the petitioner. One of the questions which the petitioner sought to have reviewed by this Court

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[1] P. 227 U. S., 926 L. Ed.

was whether the respondents acquiesced in the infringement and were thereby estopped. The Court said that this depended on the facts and that "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."[1]

Various members of this Court have from time to time set forth at length the basic reasons underlying the doctrine that this Court should not grant certiorari merely to review evidence and inferences therefrom: **E. g., Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443 (opinion of Mr. Justice Harlan, in which Mr. Justice Burton concurred, appearing at page 559 U. S. and 517 L. Ed.; opinion of Mr. Justice Frankfurter appearing at page 524 U. S. and at page 520 L. Ed.); **Dick v. New York Life Insurance Company**, 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921 (opinion of Mr. Justice Frankfurter, in which Mr. Justice Whittaker joined, appearing at page 447 U. S. and 943 L. Ed.); **Michalic v. Cleveland Tankers, Inc.**, ... U. S. ..., 5 L. Ed. 2d 20, 81 S. Ct. ... (opinion of Mr. Justice Frankfurter appearing at page 26 L. Ed.; opinion of Mr. Justice Harlan, in which Mr. Justice Whittaker and Mr. Justice Stewart joined, appearing at page 26 L. Ed.); **Sentilles v. Inter-Caribbean Shipping Corp.**, 361 U. S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173 (concurring opinion of Mr. Justice Stewart appearing at page 111 U. S., p. 145 L. Ed., with which Mr. Justice Harlan concurred; dissenting opinion of Mr. Justice Frankfurter appearing at page 111 U. S., p. 146 L. Ed.); **Wilkerson v. McCarthy et al.**, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (concurring opinion by Mr. Justice Frankfurter at page 64 U. S., p. 506 L. Ed., with whom Mr. Justice Burton joined). See, also, cases collected in **Annotation**, 4 L. Ed. 2d 1787, 1790, footnotes 19 and 20.

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[1] P. 178 U. S., 1275 L. Ed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

.....

GEORGE W. YANCEY,
1103 Comer Building,
Birmingham 3, Alabama,
Counsel for Respondent.

JOSEPH S. MEAD,
EMMETT R. COX and
MEAD, NORMAN & FITZPATRICK,
1033 Frank Nelson Building,
Birmingham 3, Alabama,
Of Counsel.

APPEARANCE OF COUNSEL FOR RESPONDENT.

The Clerk will enter my appearance as counsel for the respondent.

Dated: ....., 1961.

.....

George W. Yancey,
Address: 1103 Comer Building,
Birmingham 3, Alabama.

Affidavit of Service.

State of Alabama, }
Jefferson County. }

Before me, Hazel Hitchcock, the undersigned Notary Public in and for said County, in said State, personally ap-

peared Emmett R. Cox, who, being known to me and being by me first duly sworn, deposes and says on oath as follows: That he has personally served a copy of the above and foregoing Brief for Respondent upon Honorable Douglass P. Wingo, counsel of record for petitioner, by delivering a copy thereof to him at his office, or to a clerk in his office, at 1115 First National Building, Birmingham, Alabama; and that he has served a copy of the above and foregoing Brief for Respondent upon Honorable John S. Foster and Graham, Bibb, Wingo and Foster, of counsel for petitioner, by delivering a copy thereof to them at their office, or to a clerk in their office, at 1115 First National Building, Birmingham, Alabama, on this the ..... day of ....., 1961.

.....

Sworn to and subscribed before me this ..... day of ....., 1961.

.....

Notary Public.